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No. ———

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

JEFFERSON COUNTY, KENTUCKY
WILBUR BILYEU and
RUSSELL McDANIEL - - - - **Petitioners**

versus

DONALD L. HAYS, JR., and
MICHAEL C. POTTER - - - - **Respondents**

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Is 42 U.S.C. §1983 the Exclusive Remedy for Alleged Constitutional Violations By a Municipality or a County Under the Standards Set Forth in *Monell* v. *New York City Department of Social Services*, 436 U. S. 658 (1978)?

II. What Is the Appropriate Standard of Liability Under 42 U.S.C. §1983 to Be Imposed On Supervisory Police Officials Who Do Not Directly Participate in, Authorize, Approve or Have Prior Knowledge of Alleged Misconduct of Subordinates?

III. In Lawsuits Such as the Instant Case, How Should Jury Instructions Be Structured to Properly Identify the Various Standards of Liability for Supervisory Police Officials and Governmental Entities?

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2. *Hays and Potter* v. *Jefferson County, Kentucky et al.* (consolidated action) Nos. C75-0335L(A) and C76-0424L(A), Judgment entered June 29, 1979.

3. *Hays and Potter* v. *Jefferson County, Kentucky, et al.* (consolidated action) Nos. C75-0335L(A) and C76-0424L(A), Memorandum Opinion (award of attorneys fees and costs), entered October 25, 1979.

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7. *Hays and Potter* v. *Jefferson County, Kentucky, et al.*, 668 F. 2d 869 (6th Cir. 1982).

8. *Hays and Potter* v. *Jefferson County, Kentucky, et al.*, Order denying Petitions for Rehearing in Banc and Dissent, 673 F. 2d 152 (6th Cir. 1982).

STATEMENT OF GROUNDS FOR SUPREME COURT JURISDICTION

On January 4, 1982 the United States Court of Appeals for the Sixth Circuit issued its Slip Opinion in *Hays and Potter* v. *Jefferson County, et al.*, 668 F. 2d 869 (6th Cir. 1982), which Petitioners now request this Court to review by Petition for Writ of Certiorari. On March 10, 1982, the Sixth Circuit entered an Order, along with a dissent by four of the Circuit Judges, denying the Petitions for Rehearing requested by both Petitioners and Respondents, 673 F. 2d 152 (6th Cir. 1982).

Petitioners believe 28 U.S.C. Section 1254(1) and 28 U.S.C. Section 2101(c) confer jurisdiction on this Court to review the Judgment of the United States Court of Appeals for the Sixth Circuit in *Hays and Potter* v. *Jefferson County, Kentucky, et al.*, 668 F. 2d 869 (6th Cir. 1982).

CONSTITUTIONAL PROVISIONS AND STATUTES

Amendment Fourteen, Section One

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C., Section 1331(a)

The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000.00, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States, except that no such sum or value shall be required in any action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

28 U.S.C., Section 1343

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person;

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in Section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in

Section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

42 U.S.C., Section 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and the laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

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WILBUR BILYEU and
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

May it please the Court:

STATEMENT OF THE CASE

The instant matter was initiated by Complaints filed by the Plaintiffs, Donald L. Hays, Jr. and Michael C. Potter, in the United States District Court for the Western District of Kentucky at Louisville, alleging violation of their constitutional rights by numerous Defendants including Petitioners, Jefferson County, Kentucky, Russell McDaniel, the then Jefferson County Chief of Police, and Wilbur Bilyeu, a supervisory Jefferson County Police official. The Hays and Potter Complaints, which were consolidated for trial, were based on two causes of action: 42 U.S.C. Section 1983

with jurisdiction under 28 U.S.C. Section 1343 and the second directly under the Constitution with jurisdiction based on 28 U.S.C. Section 1331.

The trial in this action was before the Honorable Charles M. Allen, Chief District Judge, and only the claims against the Petitioners herein were submitted to the jury but on different causes of action. Judge Allen awarded a directed verdict for Jefferson County on Plaintiffs' § 1983 cause of action but retained the County as a Defendant for Plaintiffs' cause of action directly under the Constitution. It was submitted to the jury as a negligence action whereby recovery against Jefferson County was predicated on finding either or both police officials negligent in training, supervision or control of unidentified Jefferson County Police officers. The case against Chief McDaniel and Major Bilyeu, who was in command at the riot where Plaintiffs were injured, was submitted to the jury under § 1983 on the issue of negligent training, supervision or control of unidentified Jefferson County Police officers who actually caused the injuries to Plaintiffs.

The jury returned verdicts against all Defendants for compensatory damages and awarded punitive damages against Major Bilyeu and Jefferson County. All Defendants made appropriate post judgment motions and Judge Allen granted a partial judgment notwithstanding the verdict only on the issue of punitive damages. All Defendants appealed to the United States Court of Appeals for the Sixth Circuit and a cross-appeal was filed by both Plaintiffs. On January 4,

1982, the Sixth Circuit reversed the judgment and remanded the case to the District Court for a new trial. *Hays and Potter* v. *Jefferson County, Kentucky et al.*, 668 F. 2d 869 (6th Cir. 1982). Petitioners and Respondents each filed Petitions for Rehearing En Banc with the Sixth Circuit. By Order dated March 10, 1982, dissent by Merrit, Brown, Kennedy and Martin, Circuit Judges, the Petitions for Rehearing were denied by the Sixth Circuit, 673 F. 2d 152 (6th Cir. 1982).

STATEMENT OF THE FACTS

The factual background surrounding the Complaints of Hays and Potter relate to a violent antibussing demonstration that occurred the night of September 26, 1975 at Bittersweet Shopping Center across from Southern High School in southwestern Jefferson County, Kentucky. A desegregation plan for the combined Jefferson County and Louisville school systems had been implemented earlier in the summer by the United States District Court for the Western District of Kentucky. As a result of this desegregation order, numerous organizations were formed to protest desegregation and numerous demonstrations of varying nature and size were held on a daily basis after the schools opened on September 4, 1975. On the night of September 5, 1975 a civil disturbance of intense violence and riotous nature occurred which prompted the Jefferson County Police Department to purchase jump suits, bulletproof vests, helmet visors and gas masks to protect the police in future riots. Police had be-

come the target of demonstrators anger in many demonstrations, often being struck with rocks, bottles, shingles, asphalt and eggs and suffered such injuries as the loss of an eye by one officer and a broken back by another.

On the day of the incident in question, September 26, 1975, demonstrations had occurred throughout the day in southwest Jefferson County at the Bittersweet Shopping Center across the street from Southern High School as they had almost every day since school began. Major Bilyeu was in command at the scene as he had been at numerous demonstrations. The crowd had grown from 50 to 75 persons in the morning to approximately 300 to 500 persons by 10 P.M. A minimum number of police officers had been present throughout the day but at 7:30 or 8:00 P.M., Major Bilyeu determined that the fire the protestors had built in 55 gallon drums should be extinguished because it was becoming dangerous and he called in 40-50 police officers. Major Bilyeu, who had set up a command point on the Southern High School grounds, went into the crowd to talk to some of the leaders about the fire and an agreement was made that the fire could be extinguished if the policemen were sent away. Major Bilyeu sent the police away and called the Okolona Fire Department. However, when an attempt was made to extinguish the fire, Major Bilyeu and the firemen were both physically threatened and the path to the fire was blocked.

Major Bilyeu then determined it would be necessary to disperse the crowd and he recalled the police to the

scene. The police lined up in front of Southern High School directly across the street from the Bittersweet parking lot. After several warnings were given during an approximate five to ten minute period, approximately 50 to 100 demonstrators remained yelling obscenities and throwing various objects at the police. At this point, teargas was ordered and within 15 to 30 seconds after the gas was fired, the police advanced in a line across the street. Major Bilyeu attempted to delay their advance by ordering over a bullhorn for the police not to cross the street but because of the intense noise and the helmets and gas masks worn by the police, the great majority of officers apparently could not hear the order and continued their advance. Major Bilyeu made no further effort to delay the advance since the officers were acting in accord with their riot control training which permits any supervisory officer in the advancing line to determine when to go forward once the teargas has been fired. Major Bilyeu did not cross the street but remained at the command point. What occurred in the parking lot is the crux of the litigation and the subject of much conflicting testimony. Suffice it to say that much property damage was done either by protestors or police officers, or both, and the two Plaintiffs, Hays and Potter, were injured.

Hays stated he was severely kicked and beaten to the point of convulsions and unconsciousness by approximately five or six unidentified police officers who he said had no identification on their jump suits. Hays spent approximately ten days in the hospital and was

absent from work for a nine week period but suffered no permanent injury or disability.

According to Potter, he was forced by several unidentified officers to place his hands on a car, spreading his legs directly over a teargas canister still spewing gas. Potter testified he was struck several times on the back and shoulders and also received a blow to the knuckles on his right hand before he fell to the ground. Potter was taken to the hospital where he was treated for minor injuries and released. Potter did not miss any time from work.

REASONS FOR GRANTING THE WRIT

Petitioners have presented questions for review by this Court which Petitioners believe are important questions of federal law either wrongly decided or not clearly addressed by the Sixth Circuit. As a preface, Petitioners believe a short summary of the Sixth Circuit's Opinion in *Hays and Potter* v. *Jefferson County, supra,* would be appropriate before delineating the reasons each separate issue presented for review should be resolved by this Court.

Basically, the majority opinion in *Hays, supra,* vacated the verdict and remanded the matter to the trial court because the trial court had erroneously submitted the case to the jury on instructions framed in simple negligence language. The Sixth Circuit held:

> Because this Court holds that simple negligence is insufficient to support liability of high police officials and municipalities for inadequate train-

> ing, supervision, and control of individual officers, we must vacate the verdict and remand this matter to the District Court for a new trial. 668 F. 2d at 871-872.

The Court further concluded that jury instructions questioned by Defendants, Petitioners herein, as being respondeat superior in form and content were appropriate instructions in light of further explanatory language contained in the instructions, 668 F. 2d at 874-875. Finally, the majority determined that Defendants argument regarding the trial court's refusal to give a contributory negligence instruction was groundless because Plaintiffs were intentionally beaten by unidentified police officers and contributory negligence is not a defense to an intentional tort, 668 F. 2d at 875.

In dissent, Judge Merritt believed that Jefferson County was entitled to a directed verdict on Plaintiffs' direct Constitutional cause of action because the District Court had directed a verdict on Plaintiffs' §1983 claim. The directed verdict was granted due to Plaintiffs' failure to offer proof of a policy or custom of the County proximately causing Plaintiffs' injuries. After recognizing that the law was unclear regarding the availability of a direct Constitutional action under the Fourteenth Amendment after this Court's decision in *Monell* v. *New York City Department of Social Services,* 436 U. S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978), Judge Merritt stated:

> . . . it is clear that in this Circuit the *Monell* standard also applies to direct actions against mu-

> nicipalities as Judge Phillips stated for the Court in *Jones* v. *City of Memphis,* 586 F. 2d 622, 624-5 (6th Cir. 1978). Since there is no evidence that the harm in question here resulted from a County "policy or custom," tacitly or expressly adopted or followed by the County or its officials. I would hold that the proof is insufficient to permit the case against the County to go to the jury on the direct Bivens-type action. 668 F. 2d at 876.

Judge Merritt was also disturbed by the majority's holding regarding the standard of liability for supervisory police officials under §1983. Judge Merritt discussed what he believed to be this Court's standard of liability as expressed in *Monell, supra,* and *Rizzo* v. *Goode,* 423 U. S. 362, 96 S. Ct. 598, 46 L. Ed. 2d 561 (1976). In conclusion, Judge Merritt stated:

> Thus, considering the language of §1983, its original purpose and the statements of the Supreme Court concerning liability in *Monell,* I conclude that in police brutality cases against supervisory officials §1983 requires Plaintiff to show knowledge of a past pattern of misconduct or some prior misbehavior or some other prior act that puts the official on notice of the potential constitutional deprivation. Since there was no showing of the knowledge element of the wrong in this case, I would reverse and instruct the District Court to enter judgment for the supervisory police officials. 668 F. 2d at 877.

Petitioners believe that the Sixth Circuit's opinion in *Hays, supra,* is a decision which conflicts with applicable decisions of this Court and with decisions of

other federal Courts of Appeals. The apparent conflicts and the reasons this Court should grant the instant Petition for Writ of Certiorari will be addressed for each separate issue presented for review.

ARGUMENT

I. Is 42 U.S.C. §1983 the Exclusive Remedy for Alleged Constitutional Violations By a Municipality or a County Under the Standards Set Forth in *Monell* v. *New York City Department of Social Services*, 436 U. S. 658 (1978)

This first issue presents a question which the Federal Courts of Appeals have answered in a conflicting way. At least two Circuit Courts of Appeals, the Second and Eighth, have determined that a direct constitutional cause of action no longer exists against a municipality because a §1983 cause of action is now available under the *Monell* decision. *Turpin* v. *Mailet*, 591 F. 2d 426 (2nd Cir. 1979); *Owen* v. *City of Independence*, 589 F. 2d 335 (8th Cir. 1978), vac'd and rem'd on other grounds, 445 U. S. 622, 100 S. Ct. 1398, 63 L. Ed. 2d 673 (1980). Each of these decisions followed *Monell* and was based upon the reasoning that §1983 provides an adequate federal remedy in civil rights actions against municipalities. Therefore, there is no reason to imply a cause of action under the Constitution as was done in the bellweather case of *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U. S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971). Justice Powell, concurring in *Monell*, apparently layed the foundation for the rationale behind §1983 being the

exclusive cause of action against a municipality when he stated:

> Finally, if we continued to adhere to a rule of absolute municipal immunity under §1983, we would not long avoid the question of whether "we should, by analogy to our decision in *Bivens* v. *Six Unknown Federal Narcotics Agents,* 403 U. S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971). imply a cause of action directly from the Fourteenth Amendment which would not be subject to the liimtations contained in §1983 . . . " *Mt. Healthy City Board of Ed.* v. *Doyle,* 429 U. S. 274, 278, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977). One aspect of that inquiry would be whether there are any "special factors counseling hesitation in the absence of affirmative action by Congress," *Bivens* v. *Six Unknown Federal Narcotics Agents,* 403 U. S. 388, 396, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971), such as an "explicit congressional declaration that persons injured by a [municipality] may not recover damages . . . , but must instead be remitted to another remedy, equally effective in the view of Congress" *Id.* at 397, 91 S. Ct. 1999, 29 L. Ed. 2d 619. In light of the Court's persuaive re-examination in today's decision of the 1871 debates, I would have difficulty inferring from §1983 "an explicit congressional declaration" against municipal liability for the implementation of official policies in violation of the Constitution. Rather than constitutionalize a cause of action against local government that Congress intended to create in 1871, the better course is to confess error and set the record straight, as the

> Court does today. *Monell,* 436 U. S. at 712-713 (footnote omitted).

Several other Circuits have found it unnecessary to decide the question of exclusive remedy due to the co-extensive availability of §1983. See, *Molina* v. *Richardson,* 578 F. 2d 846 (9th Cir. 1978) and *Dean* v. *Gladney,* 621 F. 2d 1331 (5th Cir. 1980). Several other circuits who have addressed the issue, including the Sixth Circuit, have held that a *Bivens*-type action is still available. See, *Jones* v. *City of Memphis,* 586 F. 2d 622 (6th Cir. 1978).

As an example of the confusion these conflicting appellate decisions have caused among the District Courts, an examination of *Edmonds* v. *Dillin,* 485 F. Supp. 722 (N. D. Ohio 1980), a case in one of the districts comprising the Sixth Circuit, would be appropriate. *Edmonds* involved an action for alleged violations of civil rights brought against two cities, their police departments and several other police officers. The *Edmonds* court reviewed the history of the *Jones* and *Turpin* decisions and their relationship to *Monell.* In *Edmonds,* the Court held:

> In light of the Supreme Court's remand in *Turpin* and the Second Circuit's subsequent reversal of its earlier decision, in which the Sixth Circuit in *Jones* relied, this Court concludes that the Sixth Circuit, if it today decided the question, would not reach the same result it reached in *Jones.* Therefore, Plaintiffs do not have a direct cause of action under the Fourteenth Amendment. *Edmonds, supra* at page 728.

However, the Sixth Circuit's opinion in *Hays* failed to confirm the predictions of the *Edmonds* court. In *Hays,* the Sixth Circuit not only failed to affirm or overrule the same result it reached in *Jones* on this issue, but failed to directly address the issue at all. As pointed out by the Circuit Judges dissenting from the Order denying the Petitions for Rehearing En Banc, 673 F. 2d 152 (6th Cir. 1982), such failure made the majority opinion "internally inconsistent." The reason for this internal inconsistency is probably best summarized by the following passage taken from that dissent:

> The District Judge granted a directed verdict on the Plaintiff's claim under §1983 because as against the County there had been no showing of "policy or custom" as required by *Monell* v. *New York City Department of Social Services,* 436 U. S. 658 (1978). The question then is whether a different standard applies in a direct action under the Fourteenth Amendment. Our Court's opinion in *Jones* v. *City of Memphis,* 586 F. 2d 622, 624-5 (6th Cir. 1978) and good policy both require that the "policy or custom" standard be the same whether the action against the County is under §1983 or directly under the Fourteenth Amendment. Since the majority decision remands the case for a new trial in the direct action under the Fourteenth Amendment against the County, it is necessarily saying that the standard in the two types of actions is somehow different. Yet the majority opinion seems to be saying that the two standards are the same. Since the trial judge directed a verdict under §1983, it follows that if

> the same standard is used in the direct action, the trial court must direct a verdict there as well. 673 F. 2d at pp. 152-153.

Thus, the critical point to remember is that Plaintiffs' §1983 cause of action and *Bivens*-type action are factually and legally identical. As a result, the question Petitioners are asking this Court to decide is whether the availability of a §1983 action against municipalities recognized in *Monell* abrogates the availability of a *Bivens*-type action as Justice Powell hypothesized in his concurring opinion in *Monell*. As has been demonstrated, the Circuit Courts of Appeals are split on this issue thus making it a question ripe for this Court to decide. Even if this Court should determine that a direct constitutional cause of action is still available against municipalities, Petitioners believe the Court should rule that the standards of liability applicable to both §1983 and *Bivens*-type actions must be identical and consistent. Otherwise, lower courts could be in the untenable and illogical position of applying a lesser standard of liability on municipalities in *Bivens* actions than required in §1983 actions although the basis in fact for both actions is identical.

II. What Is the Appropriate Standard of Liability Under 42 U.S.C. §1983 to Be Imposed On Supervisory Police Officials Who Do Not Directly Participate in, Authorize, Approve or Have Prior Knowledge of Alleged Misconduct of Subordinates.

One of the more confusing aspects of the Sixth Circuit's Opinion in *Hays, supra,* is the enunciation and application of the standard of liability to be imposed on supervisory police officials under 42 U.S.C. §1983. It would appear that the rule laid down by the Sixth Circuit and its application to the instant matter are in conflict. The Sixth Circuit relied heavily on *Monell, supra,* and *Rizzo, supra,* as the foundation for supervisory police official liability. The Sixth Circuit noted:

> The *Rizzo* case requires that there must be a direct causal link between the acts of individual officers and the supervisory defendants. *Rizzo* v. *Goode,* 423 U. S. at 370-71. It is essentially this same concept that requires that the implementation or execution of a governmental policy or custom be shown before liability can be imposed on a municipality. *Monell* v. *Department of Social Services,* 436 U. S. 658 (1978). 668 F. 2d at 872.

The Sixth Circiut goes on to explain the application of this standard and intimates, just as Judge Merrit did in his dissent, that a knowledge element is necessary:

> A major part of the doctrinal foundation for requiring a higher degree of culpability than ordinary negligence is the concern that such a standard would unduly impede or circumscribe the

> performance of official duties. *The Courts look for some proof that a defendant has a culpable state of mind—that the action or failure to act was to some degree deliberate rather than inadvertent.* (Emphasis added) 668 F. 2d at 873.

After an in-depth examination of the various applications and verbal formulations of the *Rizzo* concept, the Sixth Circuit determined:

> The result of *Rizzo* in subsequent cases in the lower Federal Courts applying the standards it announced is that a failure of a supervisory official to supervise, control or train the offending individual officers is not actionable absent a showing that the official either encouraged the specific incident of misconduct or in some other way directly participated in it. At a minimum a plaintiff must show that the official at least implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct of the offending officers. See, e.g., *Liete* v. *City of Providence,* 463 F. Supp. 585 (D. R.I. 1978).
>
> Where, as here, the constitutional violation was not alleged to be part of a pattern of past misconduct, a supervisory official or a municipality may be held liable only where there is essentially a complete failure to train the police force, or training that is so reckless or grossly negligent that future police misconduct is almost inevitable, e.g., *Liete* v. *City of Providence,* 463 F. Supp. 590, or would properly be characterized as substantially certain to result, *Rheuark* v. *Shaw,* 477 F. Supp. 897 (N.D. Texas 1979). 668 F. 2d at 874.

It is critical to note from the above quote that the Sixth Circuit felt that "negligent training" was the crucial issue in the instant matter. If so, the failure of the Sixth Circuit to reverse and instruct the District Court to enter judgment for the supervisory police officials, as Judge Merritt recommended in his dissent, is error. As noted in Petitioner's original brief to the Sixth Circuit, the Trial Court had indicated to counsel for both parties that training was not an issue (Tr. Vol. VI, p. 117).[1] This determination came subsequent to the testimony of Plaintiff's expert on riot control training, George Tomberlin, who testified that he could not discern any deviation from proper riot control techniques by Major Bilyeu on the evening of the incident (Tr. Vol. V, p. 86). Mr. Tomberlin's only criticism was the inability of the line personnel to hear Major Bilyeu's command not to cross the street (Tr. Vol. V, p. 86). Bilyeu's testimony indicated that he did not attempt to further impede the progress of the police line because he only wanted more time for the tear gas to disseminate and the men were advancing as trained (Tr. Vol. VII, p. 167).

It is also important to note insofar as direct participation in the alleged misconduct is concerned, that Major Bilyeu did not cross the street with his men. Again, Mr. Tomberlin, Plaintiffs' expert, testified that this is recommended procedure in riot control training

[1]All Transcript references cited herein are included in the Appendix at 45a-47a in the order they appear in the body of this petition.

techniques (Tr. Vol. V, pp. 84-85). Additionally, John Nevin, Chief of the Louisville Police Department at the time of the incident and present at Bittersweet on the night in question, characterized Major Bilyeu's actions and those of his men prior to the time they actually entered the parking lot as "conducted as close by the book as you could do it. They—the people who launched gas and the movements were very professional" (Tr. Vol. IV, pp. 139-140).

Thus, under the Sixth Circuit's standard of liability for supervisory officials and the testimony of Plaintiff's own expert at trial, it was patently obvious that there was not the first scintilla of evidence introduced indicating "essentially a complete failure to train the police force, or training that is so reckless or grossly negligent that future police misconduct is almost inevitable . . ." *Hays, supra,* at p. 874. Judge Merritt recognized the incongruity of the majority holding in this regard and stated in his dissent:

> Thus, considering the language of §1983 its original purpose in the statements of the Supreme Court concerning liability in *Monell,* I conclude that in police brutality cases against supervisory officials §1983 requires plaintiff to show knowledge of a past pattern of misconduct or some prior misbehavior or some other prior act that puts the official on notice of the potential constitutional deprivation. Since there was no showing of the knowledge element of the wrong in this case, I would reverse and instruct the District Court to enter judgment for the supervisory police officials. 668 F. 2d at 877.

Therefore, absent evidence of a past pattern of misconduct and absent evidence of a reckless or grossly negligent training of the police force, under its own rule of supervisory police official liability, the Sixth Circuit erred by failing to direct the District Court to enter judgment in favor of Bilyeu and McDaniel.

III. In Lawsuits Such as the Instant Case, How Should Jury Instructions Be Structured to Properly Identify the Various Standards of Liability for Supervisory Police Officials and Governmental Entities?

The Sixth Circuit's failure to properly address the issue of the availability of a direct constitutional cause of action in light of this Court's holding in *Monell, supra,* creates far more problems than is readily apparent on the surface. The inconsistencies which permeate the *Hays* Opinion cause so much confusion that it is impossible to logically apply its opinion to litigation of the instant nature. The Sixth Circuit seemingly holds that the two causes of actions, §1983 and a direct claim under the constitution, are controlled by identical standards of liability. However, because the Trial Court awarded Jefferson County a directed verdict on Plaintiffs' §1983 claim, the Sixth Circuit's remand order for a new trial indicates the two causes of action are somehow different. If the two causes of action are identical in their standards of liability, then Jefferson County should also be awarded a directed verdict on Plaintiffs' direct constitutional cause of action. Further, if a supervisory official's liability is dependent upon some proof that such de-

fendant has a culpable state of mind, then, as the *Hays* dissent pointedly demonstrates, the supervisory officials in the instant case should also be awarded a directed verdict.

When one attempts to apply the *Hays* opinion in drafting appropriate jury instructions, the snowball of confusion rapidly approaches avalanche proportions. In their briefs to the Sixth Circuit, the Petitioners questioned several portions of the instructions to the jury by the Trial Court. However, the Sixth Circuit only addressed one particular issue and misconstrued Petitioners' argument regarding the impropriety of the questioned instructions. The instructions in question are as follows:

> This is also a civil action brought by the two plaintiffs asking for damages, both compensatory and punitive, because of alleged negligent acts or omissions of high ranking Jefferson County officials, namely Police Chief Russell McDaniel and Assistant Police [Chief] Wilbur Bilyeu, arising out of actions of officers of the Jefferson County Police force which took place on September 26, 1975 at the Bittersweet Shopping Center. A government can act in this case, only through its high ranking officials, Chief McDaniel and Assistant Chief Bilyeu. The burden is on the plaintiffs to establish by a preponderance of evidence in this case that the negligence of one or both of the officials, Chief McDaniel and Assistant Chief Bilyeu, was a proximate cause of any injuries and consequent damages sustained by the plaintiffs.

1. That officers of the Jefferson County Police force knowingly beat, bruised and wounded Plaintiffs or either of them about the body.

2. *That Chief McDaniel and Assistant Chief Bilyeu were employed by Jefferson County as Chief of Police and Assistant Chief of Police respectively, at the time of the injuries referred to herein.*

3. That Chief McDaniel and Assistant Chief Bilyeu, or either of them, negligently supervised, trained or controlled the police officers under their command at Bittersweet Shopping Center and that such negligence in supervision, training and control was the proximate cause of the injuries of the Plaintiffs or either of them, inflicted upon them by police officers on the occasion complained of.

You are further instructed that you may not return a verdict against the Defendant, Jefferson County, if you believe from the preponderance of the evidence that the Plaintiffs were injured by policemen of Jefferson County merely because of the fact that these policemen were employees of Jefferson County, Kentucky. In other words, if you believe that Chief McDaniel and Assistant Chief Bilyeu adequately supervised, trained and controlled the police officers, then you shall return a verdict for the Defendant, Jefferson County, even though you may believe, from the preponderance of the evidence, that individual policemen in employment of Jefferson County knowingly beat, bruised and wounded the Plaintiffs on the occasion

complained of. (Emphasis added) 668 F. 2d at 874-875.[2]

Petitioners argued at the Trial Court and in the Sixth Circuit that these instructions predicated liability under an improper respondeat superior relationship. The Sixth Circuit determined that the Trial Court had drawn the proper distinction in the final paragraph of the above instructions and noted that Petitioners' argument ignored the fact that a governmental entity can only act through its principal officials. 668 F. 2d at p. 875.

Petitioners still maintain the instructions are improper and the reason is two sided in nature. If a governmental entity acts only through its prinicpal officials, it obviously acts through those "whose edicts or acts may fairly be said to represent official policy." *Monell, supra,* 436 U. S. at 694. Since a county can act only through its principal officials who are policy makers, then the questioned instructions seek to impose liability on Jefferson County for the alleged "policy" actions of Bilyeu and McDaniel. However, since the Trial Court had already awarded Jefferson County a directed verdict on Plaintiffs' §1983 claims, it would be incongruous to then attempt to hold Jefferson County liable for alleged "policy" actions of its principal officials in a *Bivens* cause of action.

Secondly, if the two causes of action are somehow different and the governmental entity has received a

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[2]The entire charge to the jury appears for the Court's convenience in the Appendix at 48a-63a.

directed verdict on the §1983 claim, under what theory can the government entity properly be held liable for the *non* policy making actions of its principal officials? Petitioners believe that any jury instruction for a *Bivens* claim which is framed in language other than plan or policy acts of principal officials necessarily imputes liability to the governmental entity on a respondeat superior basis. Once plan or policy has been excluded, the acts of the principal official are no longer the acts of the governmental entity and only the employment relationship, or respondeat superior, remains.

The questioned instructions set forth, *supra,* are obviously framed in "employee" respondeat superior language and not "prinicpal official" plan or policy language. Because the Trial Court had granted Jefferson County a directed verdice on Plaintiffs' §1983 claim due to the lack of proof on the plan or policy issue, Judge Allen could not frame the *Bivens*-type action instructions in plan or policy terms and be consistent with the §1983 directed verdict. The Sixth Circuit apparently ignored the directed verdict granted Jefferson County on Plaintifs' §1983 claim and, in relation to the above instructions, noted:

> The distinction drawn by the Trial Judge in the final paragraph of the above instruction correctly distinguished the acts of the unidentified individual officers, for which Jefferson County cannot be held responsible absent a policy or custom causing such conduct, e.g., *Monell* v. *Department of Social Services,* 436 U. S. 658 (1978); *Rizzo* v. *Goode,* 423 U. S. 362, 370-71 (1976), and a failure

> to train, supervise or control those officers by Defendant's Chief of Police McDaniel and Assistant Chief Bilyeu, whose failure, for this purpose, would be the failure of Jefferson County as well. 668 F. 2d at 875.

What the Sixth Circuit fails to perceive in this passage is that the failure to train, supervise and control issue was also a core issue of Plaintiffs §1983 plan or policy claim against Jefferson County. With the plan or policy issue settled by the directed verdict under §1983, the Sixth Circuit necessarily intimates by the above passage that the standard of liability for Plaintiffs' *Bivens* claim is somehow different.

As further evidence of the confusion caused by the instructions in the instant case, Petitioners would note the following directive given by the Trial Court in its §1983 portion of the instructions to the jury:

> If you should award punitive damages as against Major Bilyeu such award should also run against the Defendant, Jefferson County.

Because Jefferson County had already been awarded a directed verdict on Plaintiffs' §1983 cause of action, this instruction permitted the jury to award punitive damages against Jefferson County even though it was no longer a viable Defendant in Plaintiffs' §1983 cause of action. Although the Trial Court eventually remitted the punitive damage aspect of the jury award, this instruction points out the confusion suffered by the district courts in these types of actions.

Thus, the incongruity and confusion evidenced by the *Hays* opinion needs to be rectified by a precise opinion by this Court as to the standards of liability to be used and the proper framing of jury instructions in that regard.

CONCLUSION

The instant case is an example of the confusion and lack of consistency throughout the circuits on the question of whether a *Bivens*-type action is still available against a governmental entity in light of this Court's decision in *Monell, supra,* which held governmental entities may be liable under §1983 for constitutional deprivations caused by a plan or policy of the governmental entity. Without a succinct opinion from this Court, the Circuit Courts of Appeal are irreconcilably split on the issue which has resulted in a total inconsistency in the administration of justice. The most devastating effect of this situation is that the District Courts are completely bereft of any universal rule of law which they can apply in dealing with governmental entity liability as well as liability of its officers and agents.

The instant case pointedly demonstrates the snowball effect that this confusion causes in attempting to apply an appropriate standard of liability for the acts of supervisory police officials. The *Monell* decision left many fundamental questions unanswered which are absolutely crucial to a determination of the critical questions of liability standards for various defendants.

What exactly constitutes a plan or policy, other than ordinances and regulations of the governmental entity, which may subject a governmental entity to liability under §1983? When is a supervisory police official a "principal official" of the governmental entity, if ever? At what rank can a supervisory police officer be considered such a "principal official"; sergeant, lieutenant, captain, major, assistant chief or chief of police? Under what circumstances, if any, are the acts of a supervisory police official considered a plan or policy of his governmental employer? Absent a controlling decision by this Court on these types of questions, the lower courts cannot possibly deal adequately with the intricacies presented by civil rights litigation.

The most debilitating aspect of the questions presented for this Court's review, is the inability of the District Courts to adequately frame appropriate instructions for a jury to determine the correct standards of liability for governmental entities and its supervisory police officials in actions like the instant matter. Lack of controlling precedent will continue to create incongruity in jury instructions of the nature exemplified by the jury instructions in the instant case. After the Trial Court had awarded Jefferson County a directed verdict on Plaintiffs' §1983 claim, it permitted the Plaintiffs' *Bivens*-type claim against the County to go to the jury on a different and lesser standard of liability. Worse, as previously noted herein, the Trial Court gave a punitive damage instruction under its §1983 instructions which permitted a punitive damage award against Jefferson County if the

jury determined that punitive damages were appropriate against Major Bilyeu. Because Jefferson County had been awarded a directed verdict on Plaintiffs' §1983 claim, it is totally ludicrous that punitive damages could be awarded against it when it is no longer a party to that portion of Plaintiffs' claim. This punitive damage instruction acutely demonstrates the continuing confusion district courts will suffer in these types of actions without a definitive opinion by this Court.

Thus, Petitioners respectfully request the Court to grant their Petition for Writ of Certiorari for the reasons stated herein all of which conform to the considerations governing review on certiorari set forth in Rule 17 of the Rules of the Supreme Court of the United States.

Respectfully submitted,

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